

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WILLIE MCINTOSH
Claimant

VS.

SEDGWICK COUNTY
Respondent,
Self-Insured

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Docket No. 245,635

ORDER

Respondent appealed the January 31, 2003 Award entered by Administrative Law Judge Jon L. Frobish. The Board heard oral argument on July 18, 2003, in Wichita, Kansas. Gary M. Peterson of Topeka, Kansas, participated in this appeal as Board Member Pro Tem.

APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared for claimant. Richard J. Liby of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a June 25, 1999 accident. In the January 31, 2003 Award, the Judge determined claimant was realistically unemployable and, therefore, awarded claimant benefits for a permanent total disability. The Judge denied respondent's request that claimant's weekly benefit be reduced by the weekly equivalent of his social security retirement benefit.

Respondent contends Judge Frobish erred. Respondent first argues that claimant is not permanently totally disabled and that claimant should be awarded permanent disability benefits that fall somewhere between a 35.5 percent permanent partial general

disability and a permanent total disability. Second, respondent argues that it is entitled to receive an offset for the social security retirement benefits that claimant receives.

Conversely, claimant contends the January 31, 2003 Award should be affirmed. Claimant argues the overwhelming weight of the medical evidence establishes that he is permanently totally disabled. Furthermore, claimant argues that he began receiving social security retirement benefits several months before the June 1999 accident and, therefore, the social security retirement benefit offset does not apply as the Kansas Supreme Court held in the *Dickens*¹ decision.

The only issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?
2. Is respondent entitled to receive an offset for social security retirement benefits despite the fact that they had commenced several months before the June 1999 accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that the January 31, 2003 Award should be affirmed.

The Board affirms the Judge's finding that claimant was rendered permanently and totally disabled as a result of his June 25, 1999 accident. On that date, claimant, who was 65 years old, slipped in some water and fell, injuring his back, right leg, hip and head. Within a week of the accident, claimant began experiencing symptoms in his neck, left arm and both shoulders. In November 2000, claimant injured his left knee. According to claimant, he experienced severe back pain as he was walking through his house, causing him to turn his body, which caused his left knee to buckle.

Regarding the nature and extent of claimant's injuries, the Board is persuaded by the testimony from both Dr. Philip R. Mills and Dr. Paul S. Stein.

Dr. Mills, who treated claimant from December 1999 through June 12, 2002, diagnosed claimant as having (1) lumbar disc disease with L-4 protrusion, (2) lateral spinal stenosis with possible L-5 radiculopathy, (3) left ulnar nerve neuropathy, (4) cervical degenerative disc disease with muscle tension encephalgia, (5) post-traumatic myofascial pain syndrome, and (6) internal derangements of the left knee status post-arthroscopy with

¹ *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601 (1999).

meniscectomy. Dr. Mills rated claimant as having a 20 percent whole body functional impairment as a result of the June 1999 accident and the later left knee injury, which the doctor felt was, by history, a natural consequence of the original accident. According to Dr. Mills, claimant was realistically unemployable.

Likewise, Dr. Paul S. Stein, who saw claimant on three occasions and who evaluated claimant at respondent's request, testified that claimant's low back and right leg conditions, which were directly related to the June 1999 fall, rendered claimant realistically and essentially unemployable. The doctor also testified that claimant's testimony that he must lie down approximately seven hours during the day is consistent with claimant's back injury. In an August 3, 2002 note that Dr. Stein sent to then respondent's attorney E. L. Lee Kinch, the doctor wrote:

I have received a letter from Mr. Kinch dated 7/30/02 requesting specific work restrictions due to the patient's work injury. I have reviewed all of my notes. In my last paragraph of the report issued on 7/24/02, **I state that it is unlikely Mr. McIntosh can be gainfully employed at this time because of restrictions related to his lower back and right leg pain.** This is based upon my examination, his complaints and reports of radiologic studies. I did not have any of the films available for review. Any work activity would be sedentary with the ability of the patient to stand and move around as needed. **He might require the ability to lay down intermittently during the day and take substantial breaks in order to do this. There would be essentially no lifting, bending, twisting or walking involved.** (Emphasis added.)

The Board is aware that Dr. Scott R. Jahnke, who last saw claimant in June 2001, testified he believed that claimant most likely would be able to return to a light duty job. But the doctor qualified that opinion by stating that claimant's ability to work would be determined by the degree that claimant's ongoing back spasms were incapacitating.

As indicated above, the Board agrees with the Judge that it is more probably true than not that claimant's June 1999 work accident rendered him realistically unemployable and, thus, permanently and totally disabled.

The Board also affirms the Judge's conclusion that claimant's social security retirement benefits should not reduce claimant's workers compensation benefit payment.

K.S.A. 1998 Supp. 44-501(h) provides:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers

compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

In *Dickens*,² the Kansas Supreme Court interpreted that statute and held that workers compensation benefits should not be reduced by social security retirement benefits when the worker was receiving those benefits at the time of the accident. The Kansas Supreme Court reasoned that the purpose of the statute was to prevent wage loss duplication and there is no wage loss duplication when a worker is injured who began receiving social security retirement benefits before his or her work-related accident.

As claimant began receiving social security retirement benefits in either March or April 1999, his continuing to work created a second source of income. Accordingly, compensating claimant for his work-related injury does not duplicate his wage loss. The Board concludes that respondent is not entitled to a social security retirement credit or offset under K.S.A. 1998 Supp. 44-501(h).

The Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board affirms the January 31, 2003 Award.

IT IS SO ORDERED.

Dated this ____ day of July 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

² *Dickens*, 266 Kan. at 1066.

WILLIE MCINTOSH

DOCKET NO. 245,635

c: Steven R. Wilson, Attorney for Claimant
Richard J. Liby, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director